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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 582

VINCENT JOSEPH SPANO, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 1, 1958
CERTIORARI GRANTED DECEMBER 15, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

v.

VINCENT JOSEPH SPANO, Appellant

Decided April 3, 1958

OPINION—April 3, 1958

BURKE, J. Defendant has been convicted of murder in the first degree. Except for the issue as to the admissibility of a confession made by the defendant our affirmance of that conviction requires no discussion.

On February 3, 1957, the defendant telephoned one Bruno, a New York City policeman whom he had known for several years, and admitted to him that he had shot and killed the decedent, Palermo, after a fight. The next day at about 7.15 P.M., accompanied by his attorney, defendant surrendered on the street to an assistant district attorney of Bronx County and several police officers attached to the District Attorney's office. He was taken into custody pursuant to a bench warrant issued upon an indictment earlier found by the Bronx County Grand Jury. The bench warrant, as required by the Code of Criminal Procedure (§301), commanded the arresting officers "forthwith to arrest the [defendant] and bring him before [the] court * * * to answer the indictment; or if the court have adjourned for the term * * * [to] deliver him into the custody of the warden of the city prison of the city of New York." After his surrender defendant's counsel left and defendant was taken upstairs to the office of the assistant district attorney. When questioned he stated that he had been counseled to divulge his name but nothing more. He remained there until about midnight revealing nothing other than his name. While at the assistant district attorney's office he was fed by the police. Shortly after midnight defendant was removed to the 46th

Squad police headquarters for booking and fingerprinting. At about 3:30 A.M., after speaking to his patrolman friend Bruno for about an hour at the 46th Squad Office, defendant made a complete confession.

Upon the opening of court on the morning following his surrender defendant was arraigned before a County Court Judge.

It is clear in the record, and the fact is not now seriously challenged, that this confession was neither physically nor psychologically coerced. Defendant contends, however, that [fol. 3] the circumstances in which the confession was obtained render it inadmissible despite the fact that it was found to be voluntarily made. He argues that upon his surrender he was entitled either to be arraigned forthwith or to be forthwith delivered into the custody of the warden of the city prison. The failure of the arresting officers to do either of these things without undue delay, according to defendant, rendered the confession made intermediate the surrender and the arraignment inadmissible. As authority for this conclusion he relies principally upon the Supreme Court's decision in *Mallory* v. *United States* (354 U. S. 449).

Even if we concede to defendant that his detention was in violation of law it would not avail him here. By a long and uninterrupted line of decisions in this State it has been made indisputably plain that a confession is not vitiated solely because it has been procured during a delay in arraignment or unlawful detention (*Balbo* v. *People*, 80 N.Y. 484, 499: *People* v. *Trybus*, 219 N. Y. 18, 22-23: *People* v. *Doran*, 246 N.Y. 409, 423; *People* v. *Mummiani*, 258 N.Y. 394, 399-400; *People* v. *Alex*, 265 N. Y. 192, 194-195). By statute a confession is admissible unless involuntarily made under the influence of fear produced by threats or under a promise of immunity by the District Attorney (Code Crim. Pro., §395). Though it constitute a crime for which the responsible parties should be punished the unlawful detention is treated as no more than one element in the broader question of the voluntariness of the confession (*People* v. *Mummiani*, *supra*). It has significance only insofar as it lends to the establishment of the statutory grounds for exclusion.

The rule is no doubt different in the Federal system (*McNabb* v. *United States*, 318 U. S. 332, 341-345; *Upshaw* v. *United States*, 335 U. S. 410, 414; *Mallory* v. *United*

States, 354 U. S. 449, *supra*), but that does not affect us in this jurisdiction. The Supreme Court on several occasions has pointed out that the Federal Constitution does not impose upon State courts the rule of evidence which excludes a confession obtained while a prisoner was illegally detained, notwithstanding the fact that it was made without coercion (*Stein* v. *New York*, 346 U. S. 156, 187-188; *Stroble* v. *California*, 343 U. S. 181, 196-197; *Lisenba* v. *California*, 314 U. S. 219). The decision in the *Mallory* case is merely an exercise of the Supreme Court's supervisory power over courts in the Federal system (see *Stein* v. *New York*, *supra*) and as such is no more effective here than are the rules of evidence of our sister States.

There are, as defendant urges, factual distinctions between the present situation and that before the courts in the earlier cited cases. Here the warrant requiring defendant's prompt arraignment was a bench warrant issued upon an indictment. In the cited instances there was no [fol. 4] indictment extant at the time of the arrest. Moreover, custody of defendant in this case was not obtained by apprehension but by means of defendant's voluntary surrender made in the presence of defendant's attorney. These distinctions afford defendant no relief.

The rules of criminal procedure requiring prompt arraignment are designed in the main to guarantee that a person will not be detained except upon a clear showing of probable cause, and to provide the defendant with the opportunity of procuring legal counsel (see *Mallory* v. *United States*, 354 U. S. 449, 452-456, *supra*; *People* v. *Mummiani*, 258 N. Y. 394, 399-400, *supra*). Here there was evidence that these objectives had in effect been met. The indictment is, of course, a determination that probable cause existed for believing the defendant to be guilty of the crime charged. More that that, however, at the time of his detention and before interrogation there was a strong evidence of defendant's guilt out of his own mouth, in the form of his prior admission to patrolman Bruno over the telephone. In any event it was the duty of the police to verify the accuracy of the version of the conversation with the defendant given by Bruno. As for the opportunity to procure counsel, the record shows that defendant did have the benefit of counsel and counsel's instruction preliminary to his surrender. The

fact, impressed upon us by defendant, that he had been told by his attorney to disclose nothing but his name indicates that the subsequent interrogation was anticipated.

All that has been said assumes that there was in fact an unlawful detention of the defendant in this case. That fact is by no means established in the record. When defendant surrendered shortly after secen o'clock at night on February 4th the County Court had recessed for the day. The arraignment was had as soon thereafter as the courts reopened, at about 10:00 A.M., the following morning. Moreover, since the court had not "adjourned for the term" there was no injunction in the warrant requiring that defendant be turned over to the warden of the city prison.

It appears, therefore, that there was in fact no failure to arraign promptly and no requirement to cede custody of the defendant to the warden of the city prison. Under the circumstances the detention was not in violation of the mandate of the bench warrant, or for all that appears, of any law.

If we were to treat only of the defendant's arguments on appeal, we could end here. However, the additional reasons for reversal urged by the dissent make appropriate some further brief comments.

For the most part those arguments either assume a state of facts that simply are not before us or call for a new rule.

Whatever else may be said of *People* v. *McMahon* (15 N.Y. 384) and *People* v. *Mondon* (103 N. Y. 211) they are plainly [fol. 5] not controlling here. Those cases held that it was an invasion of the right of the accused to call him as a *witness* in a criminal hearing in which the charge was being examined. Confessions given under those circumstances were deemed inadmissible because it was considered that "a judicial oath, administered when the mind is disturbed and agitated by a criminal charge" might have the effect of preventing free and voluntary mental action (*People* v. *McMahon, supra,* p. 395). At best the soundness of this rationale is open to question (see *People* v. *Ferola,* 215 N.Y. 285, 293 *et seq.*) but, even granting its total validity today, it obviously has no application to the pre-arraignment confession with which we are presently concerned.

In our State law the test to be applied to the instant confession is that which was crystallized in section 395 of the

Code of Criminal Procedure requiring a determination as to whether a confession was voluntarily made in the traditional and ordinary sense, i.e., without duress, mental or physical. This is also the standard against which the confession must be measured for the purpose of determining whether or not it comports with the constitutional requirements of due process (*Gallegos* v. *Nebraska*, 342 U. S. 55, 65; *Brown* v. *Mississippi*, 297 U. S. 278, 285-286; *Stroble* v. *California*, *supra*, p. 197; *Stein* v. *New York*, *supra*, pp. 187-188). Obviously, since the confession before us was not extracted by means of threats, fear or violence but was freely or voluntarily given, there can be no valid objection to its admission on either of these grounds. Certainly, even the most vigilant guardian of civil liberties cannot fairly equate the present situation to that before the Supreme Court in *Rochin* v. *California* (342 U. S. 165) where it was held that admission in evidence of a confession procured by "unlawfully assaulting, battering, torturing and falsely imprisoning the defendant" (*Rochin* v. *California*, *supra*, p. 167) deprived him due process of law. The facts in this case show nothing comparable; there was here no coercion, violence or brutality to the person of the defendant (see *Irvine* v. *California*, 347 U. S. 128, 133).

The suggestion that the use of the confession is a violation of defendant's right against self-incrimination is also inappropriate on the present facts. That privilege is limited to cases where incriminatory disclosure has been extorted by the constraint of legal process directed against a witness (*People* v. *Defore*, 242 N. Y. 13, 25; *Adams* v. *New York*, 192 U. S. 585, 597, 598). The absence of any compulsion here makes that privilege inapplicable and *People ex rel. Kenny* v. *Adams* (292 N. Y. 65) cited in the dissent inapposite.

Nor can it be said that defendant has been denied a right to counsel guaranteed him by law. It should be considered in this regard that defendant did have the benefit of his [fol. 6] attorney's advice before being taken into custody and consistently followed that advice until he conferred with his friend, Bruno, with whom he had consulted the previous day. That notwithstanding, nothing in our statutes or cases and certainly nothing in the Federal law requires exclusion of a confession made during a pre-arraignment

questioning (see *People* v. *Mummiani*, 258 N. Y. 394, 400, *supra*; *Gallegos* v. *Nebraska*, 342 U. S. 55, 65, *supra*). In our State the statutes provide that the defendant has a right to counsel *upon arraignment* (Code Crim. Pro., §§ 188, 189, 296-a, 308, 690). It has always been the law of this jurisdiction that the mere fact that a confession was given by defendant while under arrest or to the State's officer in whose custody he was does not operate to exclude the confession (*Murphy* v. *People*, 63 N. Y. 590; *People* v. *Chapleau*, 121 N. Y. 266; *People* v. *Garfalo*, 207 N. Y. 141, 145). There is no legal requirement on the part of such officers to warn the defendant that he is under no obligation to make any statement and the failure to so warn him or to provide any of the safeguards available to him upon arraignment is no grounds for excluding his voluntary admissions of guilt (*People* v. *Randazzio*, 194 N. Y. 147, 158).

In sum, nothing in the law as it presently exists would bar the admission of defendant's confession under the circumstances here present. Nor were the circumstances of its rendition such as to prompt us to assume for ourselves, if indeed we properly can, the responsibility of ameliorative regulation by judicial decision. Whatever reservations may be entertained as to the propriety of the procedure followed by the State here may be directed to the Legislature (see *People* v. *Randazzio*, 194 N. Y. 147, 159-160, *supra*).

Accordingly, the judgment of conviction should be affirmed.

Desmond, J. (dissenting). This court has long since committed itself to the proposition that a confession if in fact voluntary may be admissible in evidence even though taken from a prisoner during an illegal detention (*Balbo* v. *People*, 80 N. Y. 484, 499) and even when taken in disregard of the statutory requirement of prompt arraignment before a magistrate (Code Crim. Pro., § 165; Penal Law, § 1844; *People* v. *Mummiani*, 258 N. Y. 394, 396, 411-412). But now we go much further. Now we accept as evidence a confession extracted during the very course of judicial proceedings, after indictment and surrender on a bench warrant, when the time for investigation has passed and when the prisoner, no longer a suspect but now a defendant held under court process awaiting trial, has retained counsel who

has warned him not to give evidence to the public authorities. A citizen, learning that he has been indicted and that a bench warrant is outstanding against him, consults an attorney. The attorney, conforming strictly to his profes- [fol. 7] sional duty, instructs his client forthwith to surrender, arranges for surrender to the representatives of the Distict Attorney's office at a police station. The lawyer accompanies his client to the place of surrender, warns him not to make any statement, then leaves his client in the custody of the officers, justifiably confident that the client's rights are safely under the protection of the court and of its mandate. The prosecutor, in his brief on this appeal, reminds us that "Spano's attorney could have waited until 10:00 A.M. the next morning and surrender his client to the County Court". Of course he could, but, as we shall show, defendant's rights and immunities would be no different, since whether at 7:00 P.M. or 10:00 A.M., the surrender was to the court in obedience to its process.

The bench warrant, pursuant to section 301 of the Code of Criminal Procedure, directed the peace officers to arrest defendant "and bring him before the court to answer the indictment". No policeman or prosecutor had any right to change or disregard that direction. Defendant was in the custody of the court for the sole purpose of pleading to the indictment and awaiting trial in due course. All this was deliberately ignored by the police and prosecutor. Defendant, as soon as his lawyer was safely out of the way, was taken to the District Attorney's office, there questioned until midnight, then removed to a police station where after more questioning he finally made, at 3:30 o'clock in the morning, the confession we are considering. A more grievous and offensive disregard of a court's mandates and a citizen's rights can hardly be imagined. Our duty is not to condone it but to condemn it and to lay down a rule that will prevent its recurrence.

Usually, of course, the test for admissibility of a confession is voluntariness (Code Crim. Pro., § 395) and usually voluntariness is a question of fact for a jury (*People* v. *Valletutti*, 297 N. Y. 226, 231). But in one of the senses in which the courts use the word "voluntary", a confession or incriminating testimony taken from a defendant without warning of his rights during the progress of the criminal

cause against him is not "voluntary" (*People* v. *McMahon*, 15 N. Y. 384, 388 *et seq.*; *People* v. *Mondon*, 103 N. Y. 211, 217 *et seq.*). Since in such a case the fact is undisputed, the question is not one for the jury but a constitutional question of due process on undisputed fact (*Gallegos* v. *Nebraska*, 342 U. S. 55, 62). Some violations of right are too fundamental to be excused by a jury of laymen. Directly and frankly violated here were two such rights: the right to have the advice of a lawyer at every stage of a court proceeding, and the right not to be forced to testify against oneself during such a proceeding.

Our statutes and decisions (Code Crim. Pro., §§ 308, 699; *People* v. *McLaughlin*, 291 N. Y. 480; *People* v. *Marincic*, [fol. 8] 2 N. Y. 2d 181) endlessly state and repeat the guarantee of every defendant's right to have the effective services of counsel at every stage of every criminal cause. But what use are these to a prisoner who, held awaiting trial, is questioned in the absence of his counsel, and contrary to counsel's express directions, until he confesses? Before a magistrate or a coroner or other judicial officer a defendant may under no circumstances be forced to make admissions of his guilt (see *People* v. *McMahon*, 15 N. Y. 384, *People* v. *Mondon*, 103 N. Y. 211, *supra*). Yet the same defendant in the same criminal cause held under the process of the same court, can (it is now decided) be subjected to secret midnight questioning, out of reach of any lawyer, until he confesses. Despite the *People* v. *Defore* rule (242 N. Y. 13) this is a violation of the right against self-incrimination since the defendant is compelled in the course of a criminal prosecution to incriminate himself by his own utterances (*People ex rel. Kenny* v. *Adams*, 292 N. Y. 65, 70 *et seq.*). Surely this is the use by the State of another method of obtaining evidence which "shocks the conscience", offends accepted "canons of decency and fairness" and so invades the due process clause of the Fourteenth Amendment (*Malinski* v. *New York*, 324 U. S. 401, 412-418; *Rochin* v. *California*, 342 U. S. 165, 171, 172).

We find no New York decisions condemning the practice employed here, probably because it is (let us be grateful) infrequent. But the reasoning, though not the result, of *People* v. *Perez* (300 N. Y. 208, 217, 218) requires a new trial here. Perez was held not as a defendant but, by court

order, jailed as a material witness. He claimed on the trial that his protracted questioning in jail over a period of several days, plus refusal to let him see a lawyer, violated his rights and made his confession inadmissible. This court, rejecting the contentions, pointed out that he was in jail not as a defendant awaiting trial but as a witness who had stated to the police that he could help them find the culprit. As to consulting counsel, the record showed that Perez never asked his visiting relatives or the assistant district attorney to get him a lawyer. It is strongly suggested in the Perez opinion (see 300 N. Y. 219) that were Perez actually a defendant the decision would have been different.

Even in *Lanza* v. *New York State Joint Legis. Comm.* (3 N Y 2d 92, cert. denied 355 U. S. 856), while we refused to ban disclosure by the committee of the eavesdropped talk in the jail between Lanza and his lawyer, we flatly held that "if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annulled by the courts on the ground that the interference with his right to counsel had destroyed his constitu-[fol. 9] tional right to a fair trial" (3 N Y 2d 98, citing *Matter of Fusco* v. *Moses*, 304 N. Y. 424, and other cases). We said in *Lanza* that "where in the course of a criminal trial the defendant's right to confer privately with his counsel has been violated, the trial is vitiated" (3 N Y 2d 98). Why should not the same good rule be applied here?

This defendant may be a hoodlum and a killer but it is such wretches who most need the constitutional guarantees. And, if such a man be deprived of his basic rights under the law, what man is safe?

The judgment should be reversed and a new trial ordered.

Chief Judge Conway and Judges Dye and Froessel concur with Judge Burke; Judge Desmond dissents in an opinion in which Judges Fuld and Van Voorhis concur.

Judgment of conviction affirmed.

[fol. 10] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of April in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

Witness,

The Hon. Albert Conway, Chief Judge, Presiding;
Raymond J. Cannon, Clerk.

REMITTITUR April 3, 1958

[fol. 11]

No. 173

THE PEOPLE &c., Respondent

vs.

VINCENT JOSEPH SPANO, Appellant

Be it Remembered, That on the 28th day of June in the year of our Lord one thousand nine hundred and fifty-seven, Vincent Joseph Spano, the appellant—in this action, came here unto the Court of Appeals, by Herbert S. Siegal, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court, Bronx County. And The People of The State of New York, the respondent—in said action, afterward appeared in said Court of Appeals by Daniel V. Sullivan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 12] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Herbert S. Siegal, of counsel for the appellant—, and by Mr. Irving Anolik, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of conviction

of the County Court, Bronx County, appealed from in this action, be and is hereby in all things Affirmed:

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

[fol. 13] Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Bronx County, before the Judges thereof, according to the form of the statute in such case made and provided.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York. Court of Appeals, Clerk's Office, Albany, April 3, 1958.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 14] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, HON. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 300

THE PEOPLE &c., Respondent,

vs.

VINCENT JOSEPH SPANO, Appellant

ORDER AMENDING THE REMITTITUR—June 25, 1958

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, That the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that admission into evidence of a confession rendered by him violated the Fourteenth Amendment of the Constitution of the United States. This Court held to the contrary."

And the County Court, Bronx County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

[fol. 15] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 80 Misc.

VINCENT JOSEPH SPANO, Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —December 15, 1958

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same

is hereby, granted. The case is transferred to the appellate docket as No. 582.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and application.

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FEB 16 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 582

VINCENT JOSEPH SPANO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

RITA D. SCHECHTER,
Attorney for Petitioner.

HERBERT S. SIEGAL,
of Counsel.

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POINT TWO—The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection and exception of a confession which was taken from him involuntarily and while in custody, and after he had been in such custody for upwards of eight hours during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement, and against which he had been advised until ultimately, and after continued interrogation, the authorities succeeded by coercion in prevailing upon said defendant to relinquish the said advice and to supersede the judgment and advice, both of the defendant and his attorney, thus yielding to the authorities and, by virtue of all of the aforesaid, to render a statement which was thereafter admitted in evidence against the said defendant—all of which occurred subsequent to indictment, and after the defendant, through his attorney, had voluntarily surrendered pursuant to a Bench Warrant issued out of the judicial proceeding instituted by the said indictment 24

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IN THE

Supreme Court of the United States

October Term, 1958

No. 582

VINCENT JOSEPH SPANO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

Opinions Below

The opinions made, entered and filed in the Court of Appeals of the State of New York are reported in 4 N. Y. (2d) 256.

Jurisdiction

Within the time prescribed by 28 U. S. C. Sec. 2101(c) petitioner served and filed his petition for a Writ of Certiorari to the Court of Appeals of the State of New York as authorized by 28 U. S. C. Section 1254(1) and 28 U. S. C. 1257 Subd. 3.

Constitutional Provision Involved

The Constitutional provision involved in this case is the Fourteenth Amendment of the Constitution of the United States, the pertinent portion of which reads as follows:

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U. S. C. A., Constitution, Amendment 14.*

Questions Presented for Review

I. Was the defendant denied Due Process of Law by the refusal of the police officers and the District Attorney, Bronx County, to allow him to consult with his attorney upon demand being made by him to do so after the said defendant had been voluntarily surrendered by said attorney to the authorities, pursuant to a Bench Warrant which had been issued following an Indictment of the said defendant in a Judicial Proceeding then in full force and in existence at a time when the said defendant was no longer suspect but was a party defendant in said Judicial Proceeding?

II. Was the defendant denied Due Process of Law by the admission into evidence over objection and exception of a confession which was taken from him while in custody, and after he had been in such custody for a period upwards of eight hours, during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement at all and against which he had been advised, and which advice he had continually adhered to and insisted upon so doing, giving to the authorities nothing but his name until finally after approximately eight hours of continual interrogation, the authorities succeeded by cajoling, tricking and undue influence, in prevailing upon an exhausted defendant to relinquish the said

advice and to substitute and to supersede the judgment and advice both of the defendant and of his attorney to obtain the said confession which was admitted in evidence upon the trial against the said defendant—all of which occurred subsequent to an Indictment and after the defendant through his attorney had voluntarily surrendered pursuant to a Bench Warrant founded upon the Judicial Proceeding instituted by said Indictment.

Statement

The within appeal is taken from an order and judgment of affirmance of the Court of Appeals of the State of New York, rendered on or about April 3, 1958, sustaining and upholding a certain Judgment of Conviction and Sentence of Death rendered in the County Court, Bronx County (Schulz, J. and a Jury) on the 9th day of May, 1957 for the crime of Murder in the First Degree (Section 1044, Subd. 1, Penal Law of the State of New York). The said defendant is now in Sing Sing prison awaiting the execution and enforcement of the said sentence of death, contingent, of course, upon what transpires herein.

Certiorari was granted by this Honorable Court on or about the 15th day of December, 1958.

It might be stated that the judgment of affirmance of the Court of Appeals of the State of New York was by a divided court (four to three) and the opinions rendered in connection therewith are reported in 4 N. Y. (2d) 256.

On January 22, 1957 at or about 6 P. M. the petitioner-defendant and the victim, Frank Palermo, Jr. (aged 28 years) had an altercation which originated by way of argument over money at the Roosevelt Bar and Tavern located at 187th Street and Arthur Avenue, in the Borough and County of Bronx, City of New York; a fight ensued outside the said premises from which it appears that the said Frank Palermo, Jr. (a former professional pugilist of some prominence) administered upon the defendant a cruel

and savage beating, leaving the defendant not only severely injured and bleeding, but also leaving the defendant, with the admonition and demand that the petitioner-defendant bring some money (for no reason at all, other than unlawful demand) to a certain candy store in the area located at 189th Street and Hughes Avenue, Borough of Bronx, City of New York (94-96).* That as it later developed, the said candy store was a rendezvous or hangout for the victim and his cronies, all of whom were ex-convicts (104-106, 121-123, 387, 877-878, 1017-1018, 1091, 1092; pp. 1446, 1466, Record on Appeal).

The petitioner-defendant, following the said fracas, reentered the bar and proceeded to attempt to wash himself of the blood, and at or about 6:10 P. M. left the said premises (903-908).

Thereafter, and at or about 6:15 P. M., on the said 22nd day of January, 1957 and only a short time after the said altercation, the petitioner-defendant was observed by one Peter Gueriero (a thirteen-year-old boy who was in temporary charge of tending the said candy store) entering the same and at separate intervals thereafter, there was heard the discharge of five shots in two volleys, two of which shots penetrated the body of the said Frank Palermo, Jr. killing him almost instantaneously (373-383, 411-414, 425-429).

The petitioner-defendant thereupon left the said premises and was unheard from until February 3, 1957 (a period of approximately 12 days) as will hereinafter appear (2255).

On February 1, 1957, approximately nine (9) days, after the said homicide, and while the defendant was still at large, an Indictment charging the petitioner-defendant with the crime of Murder in the First Degree was found by the

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* Numbers in parentheses refer to folios of the Record on Appeal, unless otherwise specified.

Grand Jury of Bronx County which said Indictment was filed in the County Court, County of Bronx.

The said Indictment reads as follows:

> "The Grand Jury of the County of Bronx, by this indictment accuse defendant, Vincent Joseph Spano, of the crime of Murder in the First Degree, committed as follows:
>
> The said defendant, in the County of Bronx, on the twenty-second day of January, 1957, wilfully, feloniously and of his malice aforethought, did shoot and kill one Frank Palermo, Jr., with a pistol and revolver."

That pursuant to the said Indictment and in accord with Section 301 of the Code of Criminal Procedure of the State of New York, a Bench Warrant was thereupon issued for the arrest and apprehension of the defendant (1485, 1486, 1847, 1848, 1849).

That the form of Bench Warrant employed in the State of New York, pursuant to Legislative Mandate (Section 301, *supra*) reads substantially, as follows:

> "* * * You are therefore, commanded forthwith to arrest the above named * * * and bring him before that Court * * * to answer the Indictment; or if the Courts have adjourned for the term, that you deliver him into the custody of the Sheriff of the County of * * * or in the City of New York to the Warden of the City Prison of the City of New York. * * * *"

The Activities of the Police Authorities From January 22, 1957 (the Date of the Killing) and February 1, 1957 (the Date of the Filing of the Indictment)

The record herein is clear that immediately following the occurrence, the Police Department of the City of New York, and particularly that of the County of Bronx, including the District Attorney's Office, Bronx County, moved

into action to determine the identity of, and to apprehend the perpetrator of the homicide of the victim herein.

The identity of the defendant was obviously immediately established by means of the witness, Peter Gueriero, who testified that he had known the defendant (the person who entered the premises and fired the shots) for some time (*cf.* 381-383) and thereafter, an immediate search was made by the police for the defendant both at his home and his place of employment (1172-1174, 1553, 1555, 2409-2415).

We can see, therefore, that even though the defendant was at large and had, for all practical purposes, disappeared, nevertheless, the District Attorney, Bronx County moved the instant matter before the Grand Jury for Indictment and did, in fact, obtain an Indictment prior to the apprehension of the defendant, the said District Attorney at the said time (February 1, 1957) apparently agreeable to rely upon the evidence then in the hands of the prosecution exclusive of any evidence to be obtained from the defendant by way of admission or confession at the time of his subsequent arrest.

It is admitted that with the filing of the Indictment, the period of investigation ceased, and the judicial proceeding commenced, and that the situation changed from one being merely suspect to that of being a defendant in an action or proceeding.

The defendant, being at large, and obviously aware that the authorities were in search for him, realizing that he had been the cause of the victim's death, and further, realizing the futility of permanent flight, decided to surrender himself, but only upon the condition that he be afforded whatever legal rights and protection remained.

Thus, we see the following state of events beginning with *February 3, 1957*:

Gaspar Bruno, called by The People, testified in effect as follows:

That he was a member of the Police Department a little over five months (2250); that he knew the defendant approximately 8 to 10 years (2252); that he went to school with defendant and was a close friend of his (2252); that he spoke to defendant on the telephone on February 3, 1957 about 9:25 P. M., and that defendant phoned him (2253-2255); that the defendant stated to him that he was thinking of giving himself up, and wanted some advice; that he didn't know "whether to get a lawyer, or who to give himself up to" (2267); that the defendant stated "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing, and that he went and shot at him" (2267, 2268); that the defendant inquired as to what he thought the law would do to him (2268); that the defendant stated that he was thinking of giving himself up and did not know whether to get a lawyer (2274); and that defendant stated "I am thinking of giving myself up, but I think I should get a lawyer first" (2277); that the defendant stated "I was in a daze. I had had a few drinks. I went over and I shot at him" (2280); and further, "I had a few drinks. I lost my mind. I was in a daze" (2281).

The Events of February 4, 1957

One CHARLES CICCONE, a New York City Detective, called by the People, testified in substance as follows:

That on February 5, 1957, at or about 9 P. M., at the District Attorney's office, Bronx County, he knew that an attorney, one Russo, had theretofore surrendered the defendant (1234, 1235); that he later saw the defendant (about 12:30 P. M.—February 5, 1957) at the 46th Squad Police Station (1239); that the defendant was in the inside room from which he was not permitted to go out about five hours (1253); that the defendant during said time asked him to get Mr. Russo (1254-1269).

Detective THOMAS M. FARRELL, called by The People, testified in substance, as follows:

That he arrived at the Walton Avenue side of the Bronx County building (District Attorney's Office, Bronx County) about 6:25 P. M. on February 4, 1957 (1808) pursuant to police information; that he came there with Mr. Goldsmith, the Assistant District Attorney, Lieut. Gannon, Detective Lehier, and Sgt. Clarke; that they all met in front of the building on the Walton Avenue side (1809); that he saw the defendant walking on the street south from 161st Street and walking towards the entrance of the building (1811); that the defendant was accompanied by an attorney, Tobias A. Russo (1812); that they (the detectives and the Assistant District Attorney) received the defendant; that he was surrendered by his attorney (1813); that he (the defendant) was taken up to the Assistant District Attorney's office in the building (1814); that he was no longer accompanied by his attorney; that the defendant was seated and refused to make any statement (1815); that defendant stated "that you will have to see my attorney" and "I can't make any statements" and he said "I am not making any statements" (1815); *that this was about 7:15 P. M. on February 4th and we remained there in said building until about 12:15 midnight* (1815); that during all that time the defendant answered "nothing" (1816); that he would tell us nothing but his name; that the defendant was supplied with food and ate (1817); that after 12:15 (now February 5, 1957) they went up to the 46th Precinct, Ryer Avenue Police Station (1818); that he (Detective Farrell) was there at all times from 7:15 P. M. on February 4th to 4 A. M. on February 5, 1957 (1820); that the Assistant District Attorney (Goldsmith) was likewise present during all of said time (1820, 1821); that he attempted to talk to defendant but "He wouldn't talk to me, no sir" (1823); that there did come a time when the defendant did talk and that was about 3:30 A. M. on February 5, 1957 (1824); that there was a stenographer present (1824).

Upon cross-examination, the witness stated that defendant, in refusing to answer, said "you would have to see my

lawyer" (1837); " * * * I tell you nothing but my name"; that in the face of that, they continued to interrogate defendant in said building for five hours in Mr. Goldsmith's office (1840); that prior to the statement being taken from the defendant, Officer Bruno had been in the room with the defendant (1890) for about an hour; that at 12:30 nobody could get a statement as the defendant insisted that the police officers talk to his lawyer (1893); that the first time defendant made a statement was at 3:25 A. M. (1893); that the defendant prior to that had said "See my lawyer" (1902).

Detective MARSHALL LEHRER, called by the People, testified substantially, as follows:

That at or about 7:15 or 7:30 P. M., on February 4th, 1957, the defendant, in response to questions by the Assistant District Attorney, stated: "All I was told was to give you my name and nothing else; on the advice of my lawyer, I'm making no statement" (2115, 2124) that this continued until about 3:20 or 3:30 A. M. on February 5, 1957.

Patrolman Bruno further testified that at or about 1:15 A. M. on February 5, 1957, the defendant stated to him that his lawyer had instructed him to keep quiet and he told the officer that he would want to see his lawyer (2351, 2352) and he stated that he wanted to see his lawyer, Russo (2553); that he (the officer) came out of the room and informed the other officers that he wanted to see his lawyer, but that at no time was his lawyer obtained for him (2354); that he (the officer) despite the fact that he informed the other officers that defendant would make no statement and that he wanted his lawyer, nevertheless, was told to go back in with defendant (2362, 2363, 2364) and this continued until about 4 A. M.; that the officer (Bruno) was to prevail upon the defendant by telling him that his (defendant's) phone call got the officer in trouble (2367); that he (the officer) did in fact, tell the defendant that due to his phone call the officer was in trouble and the officer then stated to defend-

ant to "make a statement so I can get out of this trouble" (2368); that he (the officer) between 1:15 P. M. and approximately 4 A. M. went back and forth into the room with defendant pleading with him to make a statement because of the officer's children and all the while, the defendant refused to make a statement, and was calling for his lawyer (2368-2373); that he (the officer) was sent in to the defendant a fourth time by Lieut. Gannon; that he (the officer) told the defendant that if he made a statement, the Assistant District Attorney would help the defendant, whereupon he was yanked out of the room by Lieut. Gannon (2384).

The Characters Involved

The deceased, Frank Palermo, Jr., as we have heretofore noted; aged approximately 28 years, had been a professional pugilist from 1945 to 1951 and had fought in the various arenas in and around the City of New York, including Madison Square Garden, and, at one point in his career was reputed to be a moderately successful boxer; that he had retired or withdrawn from the said field of boxing as a profession in 1951 or 1952 (94-96); that thereafter he had worked intermittently at construction work, and also at Curtiss-Wright Aircraft Corporation (96); that he had been married, but the same had terminated in divorce; that the issue of the said marriage, a daughter (10 years of age) was living with the mother, who had thereafter remarried (97-98); that his general reputation was that of a trouble maker, characterized generally by viciousness and violence (2786, 2795); that at the time of the unfortunate occurrence herein, the deceased was in the company of three ex-convicts (387, 877, 878, 1017, 1018, 1091, 1092 and pp. 1446 and 1466, Record on Appeal); that the deceased and his "cronies" had apparently been carrying on a mild form of petty extortion in the neighborhood (in lieu of work) with a veiled threat of physical harm upon non-compliance, and the defendant herein was not

only the object of continuous demands, but his attempt to repel continued encroachments upon his property resulted in the vicious and cruel attack and beating which precipitated the subsequent events.

The petitioner-defendant, Vincent Joseph Spano, aged 27 years as aforestated, had been known in the area for a long time including his school days (2252, 2328); that he had no criminal record and had a consistent record of employment, and had been and was still in the employ of Curtiss-Wright Aeronautical Corporation at the Woodbridge plant in New Jersey until the within unfortunate event (1172-1187); the petitioner had been a member of the United States Army and was honorably discharged therefrom (Defendant's Exhibits 4 and 5, pp. 1470 *et seq.* and 1492 *et seq.*, Record on Appeal); the petitioner had received elementary and junior high school education (Cf. p. 1472, Record on Appeal).

POINT ONE

The refusal on the part of the Assistant District Attorney and the officers of the Police Department of the City of New York to allow defendant who had voluntarily surrendered with his attorney to consult and to confer with said attorney, whom the defendant had previously retained, upon the said defendant's repeated demands for a period of upwards of eight (8) hours, prior to extracting a written confession from the said defendant by overriding and superseding the judgment and will, both of defendant and of defendant's attorney by means of cajoling, trickery and undue influence all of which took place after investigation and subsequent to indictment where the accused was no longer suspect, but a defendant in a judicial proceeding theretofore instituted by said indictment and bench warrant issued pursuant thereto, constituted a denial of due process of law under the XIVth Amendment of the United States Constitution.

The record is clear that prior to defendant's confession, he repeatedly, and for a period of approximately eight (8) hours, called for, demanded and insisted upon conferring and consulting with his lawyer, whom he had retained theretofore for the said express purpose and protection, all the while asserting that he would give his name and nothing more, and that he would make no statement, and that he had been so advised by his attorney, but the said demands were ignored by the Assistant District Attorney and the Police Officials, until finally at or about 3:30 A. M. on February 5, 1957 (the defendant having voluntarily surrendered with his attorney at about 7 P. M. on February 4, 1957) the defendant's judgment and the judgment and advice given the said defendant by his said attorney were overridden and superseded in favor of the said Assistant District Attorney and the Police Officials, by means of cajoling, exhorting, and pleading to the point of

exhaustion and finally by trickery and fraud in the usage of a friend of defendant's, a member of the Police Department, under the pretense of loss of job and difficulties to his family and infants, attendant upon, and imminent unless a statement were obtained, the defendant was finally forced to yield his better judgment and the wisdom and judgment of his attorney, and, reliquishing the same, the said defendant now faces the death sentence following a trial in the County Court, County of Bronx, where the said within confession so obtained was declared admissible in evidence with damning and devastating effects upon the said defendant.

It is the contention of the defendant herein that the said confession was involuntary within the purview and intent of the XIVth Amendment of the Federal Constitution, and that the obtaining of it, its method, etc., as well as its subsequent usage at the trial was so shocking, and so inimical to our inherent standards of decency, justice and fundamental fairness, that it must be declared repugnant to the said Due Process Clause.

It is the further contention of the defendant that the confession, as so obtained, violated the Fifth Amendment of the United States Constitution providing that no person "shall be compelled in any criminal case to be a witness against himself", as well as the provisions of the New York State Constitution, Article I, Section 6, which provides "• • • nor shall he be compelled in any criminal prosecution to be a witness against himself • • • no person shall be deprived of life, liberty or property without Due Process of Law".

We have in mind distinctly that, with respect to the aforesaid privilege against self-incrimination, that this Court has held that the same is distinctly within the sovereignty and power of the separate States, and that this Court will not intervene under its broad supervisory and blanket power under the XIVth Amendment, unless the

conditions which obtained under so-called State power are so shocking to one's sense of decency and fundamental fairness, that necessity of a dignified jurisprudence and equitable standards fairly shrieks for relief.

See,

Adamson v. *California*, 332 U. S. 46 (1947);
Snyder v. *Massachusetts*, 291 U. S. 97, 105;
Palko v. *Connecticut*, 302 U. S. 319, 324;
Twining v. *New Jersey*, 211 U. S. 78, 91-98;
Cf. *Rochin* v. *California*, 342 U. S. 165, 171, 172;
Malinski v. *People of the State of New York*, 324 U. S. 401, 412-418.

It is urged herein that the facts in the case at bar warrant the intervention of this Court's power under the Due Process Clause of the XIVth Amendment under the doctrine of fundamental fairness and under the principles espoused in *Rochin* v. *California* (*supra*), that the conditions which prevailed herein are so shocking to one's decency that they cannot possibly prevail in a civilized State.

It has been heretofore well established by this Court that the XIVth Amendment will be employed to curb and to condemn coerced confessions in State prosecutions.

Brown v. *Mississippi*, 297 U. S. 278;
Watts v. *Indiana*, 338 U. S. 49;
Fikes v. *Alabama*, 352 U. S. 191;
Crooker v. *California*, 357 U. S. 433 (decided June 30, 1958 and subsequently to be referred to herein).

The facts herein are undisputed in the record with respect to the engagement of an attorney by the defendant prior to surrender, the said attorney's advice, the defendant's repeated demand for his attorney, the fact that all of this occurred after Indictment and Bench Warrant, and after a Judicial Proceeding against defendant had been

instituted, so that this Court may properly intervene on the said undisputed facts.

Stroble v. *California*, 343 U. S. 181;
Thomas v. *Arizona*, 356 U. S. 390;
Vogue v. *Arkansas*, 356 U. S. 560;
Crooker v. *California*, 357 U. S. 433.

In line with the above, it is urged that the confession obtained herein was not voluntary and was not the exercise of petitioner's free will and that Section 395 of the Code of Criminal Procedure of the State of New York (dealing with physical coercion, which has now been construed to include psychological coercion) is not the sole standard to be employed prior to sending a defendant to his death, and that there always remains the restraining and protective arm of the XIVth Amendment to call upon the States to give an account of their stewardship of all persons and citizens, both Federal and State.

It is not urged herein that concurrently with an arrest, a suspect may shout for a lawyer, and thus constrict and shackle police investigation—it will be urged herein, however, that the case at bar is glaringly and patently distinguishable from *Crooker* v. *California* (*supra*) and *Cicenia* v. *LaGay*, 357 U. S. 504.

It is fully understood herein that the bare fact of police detention and police examination in private of one in State custody does not *per se* render involuntary a confession by one so detained (*Brown* v. *Allen*, 344 U. S. 443), nor does the situation change from the standpoint of the Due Process Clause of the XIVth Amendment if we are to accept the majority opinions in the *Crooker* v. *California* case (*supra*) and the *Cicenia* v. *LaGay* case (*supra*), and, for purpose of this brief, we are willing to proceed on the theory that even if said cases had been decided by a unanimous Court in line with the majority, nevertheless, the result in the case at bar must be otherwise.

It must be borne in mind that the cases of *Crooker* v. *California* (*supra*), *Cicenia* v. *LaGay* (*supra*) and *Stroble* v. *California* (*supra*) are all cases involving statements taken during the period of investigation, concurrently with the arrest and prior to the institution of any judicial proceeding, and in none of the said cases had they, at the time of the confession obtained, reached a point where an Indictment had been found.

The Right to Counsel

In *Cooley on Constitutional Limitations,* 8th Edition, Vol. I at page 696 *et seq.,* it is stated:

> "Perhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel."

After alluding to the practice and cases in England, the author states at page 700:

> "With us, it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel, and generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the Court may designate someone to defend him who shall be paid by the Government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the Court engaged in the trial, and to the cause of humanity and justice.
>
> * * * In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents. * * * "

The right to the aid of counsel includes the right to communication and consultation with him.

Ex Parte Rider, 50 Cal. App. 797;
Lanza v. *New York State Joint Leg. Comm.,* 3 N. Y. (2d) 92;
Fusco v. *Moses,* 304 N. Y. 424.

In New York State, the Constitution in Article I, Section 6, makes provision for the right to counsel of an accused in criminal cases, and the Code of Criminal Procedure of New York in Sections 8, 188, 189, and 308 likewise so provides in conformity with the said Constitution.

The right to counsel to an accused in a criminal case has been universally presumed to be a derivative of the provision of the Due Process Clause of the XIVth Amendment.

It has been stated in *Crooker* v. *California* (*supra*), at page 439:

> "That right, secured in State prosecutions by the Fourteenth Amendment, guaranty of Due Process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to a fair opportunity to secure counsel of his own choice." (*Powell* v. *Alabama*, 287 U. S. 45, 53; *Chandler* v. *Fretag*, 348 U. S. 3.)

The said opinion further states that the right to counsel includes not only the right at the trial, but also refers to any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice."

> *Lisenba* v. *California*, 314 U. S. 219;
> *Moore* v. *Michigan*, 355 U. S. 155.

We have observed this Court in *Betts* v. *Brady*, 316 U. S. 455, refuse to employ the Due Process Clause of the XIVth Amendment in order to vitiate State proceedings, where there was a failure on the part of the State Court to appoint counsel for an indigent defendant, in a *non-capital* case on the theory that the proceeding in the State Court could not be declared as so shocking or as so lacking in fundamental fairness so as to warrant Federal intervention.

We have likewise observed in *Powell* v. *Alabama*, 287 U. S. 45, the rule to be otherwise in a *capital case* where it was held that the right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

In this case (as in the case at bar) SUTHERLAND, J. writing for the Court, stated at page 52:

> "The sole inquiry which we are permitted to make is whether the Federal Constitution was contravened * * * and as to that, we confine ourselves * * * to the inquiry whether the defendants were in substance denied the right to counsel, and if so, whether such denial infringes the Due Process Clause of the Fourteenth Amendment."

And at page 57, the Court states:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were actually important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

The history of the principle of the right to counsel, its development in our law and its universal acceptance in this country as part of our inherent American Ideals, having in mind, fundamental fairness in accord with our concept of justice is fully treated in the opinion of Mr. Justice Sutherland (*supra*).

In the dissenting opinion of Mr. Justice Douglas in *Crooker* v. *California* (*supra*), it is stated:

> "The Court finds no prejudice from the denial of the right to consult counsel; and it bases that finding on the age, intelligence and education of the petitioner. But it was said in *Glasser* v. *United States*, 315 U. S. 60 • • •
>
> • • • 'The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in wise calculations as to the amount of prejudice arising from its denial.' That was a Federal prosecution. But what is true of the need for counsel in a Federal case is equally true in a State case."

In the said dissent, Mr. Justice Douglas stated in effect that whatever may be the situation with respect to the rule of *Betts* v. *Brady* (*supra*) in a non-capital case, that certainly such a rule was not intended to apply to a capital case, citing *Powell* v. *Alabama, supra.*

Mr. Justice Douglas refers to the fact that both the majority and the dissent agree that the right to counsel extends to pretrial proceedings as well as the trial itself—. "The need is as great then as at any time. The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself" (p. 442, Opinion of Justice Douglas).

Cf. *Chandler* v. *Fretag*, 348 U. S. 3.

And at page 443 of the said dissent of Mr. Justice Douglas, it is stated:

> "The third degree flourishes only in secrecy. One who feels the need of a lawyer and asks for one is asking for some protection which the law can give him against a coerced confession. No matter what care is taken, innocent people are convicted of crimes they did not commit. See Borchard, *Convicting the Innocent* (1932); Frank and Frank, *Not Guilty* (1957). We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices."

Mr. Justice Douglas stresses (at p. 444) that the trial of the issue of coercion is seldom helpful to the defendant, because law officers will testify one way and the accused another, and the defendant has very little chance to prove coercion.

And at page 445:

> "For what takes place in the secret confines of the police station may be more critical than what takes place at the trial.
>
> If at any time, from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney, it is in the pre-trial period. * * * Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial."

In the footnote of the dissent, there is set forth an excerpt from an article by Dean Roscoe Pound, wherein he states in effect that police officials not only apply the third degree method, but are so bold even as to publicize it as if it were an authorized, lawful and appropriate practice.

See also,

> *Right to Counsel Prior to Trial,* 44 Ky. L. J. 103; Zechariah Chafee, *Documents on Fundamental Human Rights,* Pamphlets 1-3 (1951-1952), 1541.

In the instant case, we do not have a confession or a statement made concurrently with an arrest by police officers prior to arraignment as is the usual case, and as existed in *Crooker* v. *California* and *Cicenia* v. *LaGay.*

Here, we have a situation where the investigative state is terminated and the District Attorney and the Police have already marshalled their array of evidence and presented the same to a Grand Jury and an Indictment has been re-

turned and filed and the suspect not only has been identified and detected, but has now become a *defendant* in a criminal action then pending.

Cf. Footnote of the Scot's view at page 446 of the Dissenting Opinion in *Crooker* v. *California, supra;*
Cf. Mallory v. *U. S.*, 354 U. S. 449.

In the case at bar, the extended examination of the defendant for a period of eight hours to the exclusion of his attorney was not for the purpose of detecting or ascertaining the commission of a crime from one who was suspect—it was rather to obtain evidence to justify and to support an Indictment already found and to use said evidence thus obtained upon the trial in support of a conviction.

Balancing Interests Between Law Enforcement and the Rights of a Defendant

At page 441 of the opinion of Mr. Justice Clark in *Crooker* v. *California* (*supra*) one cannot overlook the thought underlying, when he wrote:

> "Refusal by State Authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel, which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser, but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded an opportunity to call his attorney."

We find the same thought prevailing and expressed in the opinion of Mr. Justice Harlan (writing for the majority of the Court) in *Cicenia* v. *La Gay, supra,* at page 509, where it is stated:

> "On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our

scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position would constrict State Police activities in a manner that in many instances might impair their ability to solve difficult cases. A satisfactory formula for reconciling these competing concerns is not to be found in any broad pronouncement that one must yield to the other in all instances."

It is urged (in the light of the above fears of unduly hampering law enforcement) that the said fears are groundless on the facts in the case at bar.

Let us assume that the defendant herein (instead of being surrendered at 7 P. M.) was surrendered to the Court wherein the Indictment lay and to the Judge who signed the warrant at 10 A. M. at the opening of Court.

The said defendant would then and there necessarily have to be arraigned on the warrant, and, it being a judicial proceeding—would it not be incumbent upon the arraigning Judge to advise defendant of his Constitutional rights and of his right to remain silent?

Cf. People v. *McMahon*, 15 N. Y. 384;
People v. *Mondon*, 103 N. Y. 211;
Gallegos v. *Nebraska*, 342 U. S. 55.

And in the above situation (with a judicial proceeding pending—though not of the gravity of an Indictment) wherever confessions were taken thereafter—they were excluded and declared inadmissible—in instances where the arraigning Judge failed to advise as to Constitutional rights.

So that the case at bar becomes restricted to that narrow class of cases where there is an Indictment—there is an attorney but the defendant is surrendered at an untoward time or when the Court is closed.

The District Attorney may respond that he could delay arraignment, to which we reply—not in the case of an Indictment.

If the District Attorney could delay arraignment after Indictment until a confession was procured—then, we say that by ratifying the acts herein, this Court would be empowering every District Attorney in the 48 States to visit, interrogate all defendants sitting in jail awaiting trial, even though represented by counsel, and even though judicial proceedings were in full swing.

It is urged that any confessions so obtained would certainly be condemned and the subject of force (physical or psychological) would be of no consequence.

It should be borne in mind that force is immaterial in the case of a defective arraignment—we are dealing with rights in the defendant.

Cf. People v. *McMahon, supra;*
People v. *Mondon, supra.*

It is urged, therefore, that in the instant case, the Assistant District Attorney and the Police have caused their own situation and have constricted themselves by proceeding to Indictment and thus initiating a Judicial proceeding; it is they who have thrown the defendant into the character and status of defendant as distinguished from suspect.

If, having done so, they later find (as in the case at bar) that all they have is evidence of a homicide which is a far cry from evidence sufficient to justify a deliberate and premeditated killing with malice aforethought, then let them not look to the defendant (after Indictment to supply the missing link) because the defendant chooses to stand his ground to meet the Indictment, and to surround himself with all the protection that the law affords any other defendant in any other criminal proceeding.

POINT TWO

The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection and exception of a confession which was taken from him involuntarily and while in custody, and after he had been in such custody for upwards of eight hours during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement, and against which he had been advised until ultimately, and after continued interrogation, the authorities succeeded by coercion in prevailing upon said defendant to relinquish the said advice and to supersede the judgment and advice, both of the defendant and his attorney, thus yielding to the authorities and, by virtue of all of the aforesaid, to render a statement which was thereafter admitted in evidence against the said defendant—all of which occurred subsequent to indictment, and after the defendant, through his attorney, had voluntarily surrendered pursuant to a Bench Warrant issued out of the judicial proceeding instituted by the said indictment.

The Trial Court below as well as the majority opinion in the Court of Appeals proceeded along the theory that if there were no physical or psychological coercion established by the defendant, then *ipso facto*, the confession thus obtained was voluntary as a matter of law, and, therefore, properly admissible in evidence, citing as the criterion or yardstick to be employed in determining admissibility, Section 395 of the Code of Criminal Procedure of the State of New York, declaring in effect that a confession can be given in evidence against a defendant:

> "* * * where made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor; * * *"

It is urged herein that the blanket of protection afforded to a defendant in a State prosecution in a capital case is not circumscribed or limited by said Section 395 of the said Code or any other State Legislative enactment, but that prior to a life being forfeited, the proceedings in the State Court are subject to the ever present and awe inspiring power of this Court to determine in review whether the said proceedings complied with and were in consonance with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

We shall see hereinafter cited many instances of confession extracted minus the element of force and fear (physical or psychological) and yet this Court has declared said confessions to be coerced and to be involuntary within the intendment of the Fourteenth Amendment and based upon the theory of fundamental fairness, has reversed and set aside convictions on the ground that the confessions obtained and admitted into evidence were not in conformity with our concept of justice.

In connection with the above, it is important at this point to consider and to analyze the authorities.

In the case of *Chandler* v. *Fretag*, 348 U. S. 3, it was held that by denying to the defendant any opportunity to obtain counsel as to a crime (punishable by life imprisonment) the Trial Court denied him the Due Process of Law guaranteed by the Fourteenth Amendment.

It was held that regardless of whether petitioner would have been entitled to have counsel appointed by the Court, his right to be heard through his own counsel was unqualified. (*Betts* v. *Brady*, 316 U. S. 455, Distinguished.)

In the case of *Glasser* v. *U. S.*, 315 U. S. 60, at page 71, it was stated:

> "Upon the Trial Judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused * * *. Mr. Justice Sutherland

wrote that our duty is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial, or from any of the essential elements thereof, and with a caution, increasing in degree as the offenses dealt with increase in gravity. *Patton* v. *United States*, 281 U. S. 276, 312-313.

The Trial Court should protect the right of an accused to have the assistance of counsel. This protecting duty imposes the serious and weighty responsibility upon the Trial Judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the Trial Court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

In the case of *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269 (126 Fed. (2d) 774). At page 279 of the opinion (Frankfurter, J. writing for the Court), it was stated as follows:

"The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." *Johnson* v. *Zerbst*, 304 U. S. 458, 468, 469.

We see from the above cited cases, the extreme delicacy and care which this Court has made requisite for Trial Courts in connection with the Constitutional right of an accused to be represented by counsel. Indeed, this Court has made it incumbent upon Trial Courts to be cautious and circumspect wherever a defendant has sought to waive or strip himself of the right to counsel by making certain that the same was a knowing and intelligent waiver.

In the case at bar we have the converse. The defendant, realizing that he has caused the death of another, and further realizing his own incapacity to handle the problem and his own limitations, and being panic stricken because he knows the stake involved, seeks advice, safety and protection at the hands of an attorney, whom he retains for said purpose. Is there anything unnatural in that?

When the famed Clarence Darrow was indicted (as we are told) in Kansas City, in 1914, and charged with bribery of a juror, even he (brilliant though he was) knowing that the stake was his own, sought out and retained Earl Rogers, Esq. from the Pacific Coast for protection.

When the astute and resourceful Isidor Kresel, Esq. was indicted in New York County, he likewise sought out and retained the distinguished John W. Davis, Esq. for advice and protection.

And so, in the case at bar, the petitioner abject with fear, sought out and retained one Tobias A. Russo, Esq., for advice and protection.

The State herein, however, viewed the situation otherwise, and denied and repelled his demands and precluded him from the said advice and consultation which he sought and needed and to which he was entitled.

In the case of *Glasser* v. *U. S.*, 315 U. S. 60 at 77, it was stated:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge

in nice calculations as the amount of prejudice arising from its denial."

In the case of *Haley* v. *Ohio*, 332 U. S. 596, at page 1599, it was stated as follows:

> "But the ruling of the Court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. Ashcraft v. Tennessee, 322 U. S. 143, 147-148. If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand, even though without the confession, there might have been sufficient evidence for submission to the jury". *Malinski* v. *New York, supra*, p. 404, and cases cited.

In this case (*Haley* v. *Ohio*) there was no evidence of physical brutality or psychological coercion—the Court stressed the defendant's age and the absence of counsel, and the police working in relays over a period of 5 hours to override the defendant's judgment.

Frankfurter, J., in a concurring opinion, at page 606, stated as follows:

> "It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process, the effective detection of crime and the prosecution of criminals, are furthered and not hampered."

And further at page 606:

> " 'Conduct under duress involves choice'. Union Pacific R. Co. v. Public Service Commission, 248 U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

> Unhappily, we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in severing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that a statement is not voluntary which results from pressures, such as were exacted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent, and when the situation was so contrived that appreciation of his rights, and thereby the means of asserting them were effectively withheld from him by the police. I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feeling of the American people, and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods, this Court has repeatedly denied use of the fruits of illicit methods.
>
> Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand."

In the case of *Malinski* v. *New York*, 324 U. S. 401, at page 404, it was stated as follows:

> "If the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S. 596, 597."

In the case of *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, in a footnote at page 597, it was stated:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty, is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a Constitutional right to defendant, the error requires reversal." Bram v. United States, 168 U. S. 532, 540-542 and cases cited.

In the case of *Watts* v. *Indiana*, 338 U. S. 49 at 53, in an Opinion by Mr. Justice Frankfurter, at page 50, it was stated:

> "Thus, while the State Courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility *there hangs over them the reviewing power of this court.*" (Italics ours)

And, at page 53 of the said opinion, it was further stated as follows:

> "A confession by which life becomes forfeit must be the expression of a free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. *When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal.* Eventual yielding to questions under such circumstances is plainly the product of the suction process of interrogation, and therefore, the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his Constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open Court with all its safeguards, is so

grave an abuse of the power of arrest as to offend the procedural standards of due process.
This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Preesnt Day Criminal Procedures in Europe and America. 48 Harv. L. Rev. 433, 457-458, 467-473 (1935). Under our system, society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Howkins, Pleas of the Crown, C. 46, Sec. 34 (8th Ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a Magistrate, the right to assistance of counsel—the duty to advise an accused of his Constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system, without its safeguards. Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilation has evolved for an administration of criminal justice at once rational and effective." (Emphasis supplied)

Reference is again made herein to the Footnote to Mr. Justice Douglas' Dissent in *Crooker* v. *California, supra,* at page 446 thereof, wherein it is stated that the Scot's view was recently stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate,* 1954 Sess. Cas. 66, 78:

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor, and to be brought before a Magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

POINT THREE

The contention of the respondent that the defendant herein had made a prior confession to Patrolman Bruno is without merit.

The conversation which the defendant had with Patrolman Bruno was limited to a statement to the effect that he (the defendant) shot Frank Palermo, Jr. (the deceased) and that he (the defendant) was in a dazed condition, that he had been drinking and in substance, that he did not know what he was doing.

In all respects, the said statement was exculpatory with the exception of the admission of the shooting.

The aforesaid statement to the said police officer was not an admission or confession of the crime of Murder in the First Degree (New York, Penal Law, Section 1044, Subd. 1) by any stretch of the imagination.

The said Section reads in part, as follows:

Sec. 1044. Murder in the First Degree defined.

"The killing of a human being, unless it is excusable or justifiable, is Murder in the First Degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed * * * "

It is obvious that in order to support the Indictment and to obtain a judgment of conviction, it was essential on the part of the State to establish not only that there was a homicide, but in addition, to establish the elements of the crime of Murder in the First Degree, to wit, that there existed deliberation and premeditation within the intendment of the Statute and that the homicide was not otherwise justifiable or excusable.

This was the reason for the interrogation at the District Attorney's office, and at the Station House on the 4th and 5th days of February, 1957.

The method and stategy employed in the interrogation in the statement was to have the defendant reenact piecemeal each and every act of conduct chronologically on the part of the defendant from the Bar and Grill, to his furnished room, to the procuring of a gun and then, the deliberate tracing of his steps from the said furnished room with the loaded gun to the candy store (all the while seeking to establish deliberation and premeditation from which there could be no escape) and negativing anything that might conceivably be of aid to the defendant, and further a description in detail of what transpired in the candy store negativing again any suggestion of justification or excuse and then, finally establishing immediate concealment and flight.

The aforementioned was not the conversation with Patrolman Bruno on the phone; it was rather a cold, calculated recital drawn from the mouth of the defendant of the crime of Murder in the First Degree.

The statement on the phone to Patrolman Bruno cannot possibly be equated with the incriminating and devastating statement taken from the defendant in the Station House, a statement so precise in nature and content, that its damning and condemning effect could not possibly be eliminated or explained.

The People now have the temerity, before this Court, to declare that there was sufficient evidence otherwise to sustain a conviction. We have previously disposed of such an argument in the cases hereinbefore cited.

The fact remains that the said formal and typewritten confession was used and employed by the People in support of the prosecution to the hilt, and throughout the trial, and throughout the summation and final argument on behalf of the State, and was further referred to in the Judge's charge and it is now sought to be suggested to this Court that said statement may not have influenced the verdict.

CONCLUSION

Wherefore, it is respectfully prayed that the Judgment of Conviction and Sentence of Death herein, as well as the Judgment of Affirmance thereof, be reversed and set aside.

Respectfully submitted,

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FILE COPY

To be argued by
IRVING ANOLIK

Supreme Court of the United States

October Term, 1958

Office-Supreme Court, U.S.
FILED
MAR 27 1959
JAMES R. BROWNING, Clerk

No. 582

VINCENT JOSEPH SPANO,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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Supreme Court of the United States

October Term, 1958

No. 582

VINCENT JOSEPH SPANO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Appeals of the State of New York affirming the judgment of conviction of Murder in the First Degree, rendered by the County Court, Bronx County, is reported *sub. nom. People* v. *Spano,* at 4 N. Y. 2d 256.

Jurisdiction

The jurisdiction of this Court rests upon 28 U. S. C. § 1257 subd. 3, and 28 U. S. C. § 2101(d).

Questions Presented

1. Whether petitioner, who had been previously indicted by the Grand Jury of Bronx County for the crime of Murder, First Degree, was entitled, under the Fourteenth Amendment of the United States Constitution, to have an attorney present during the course of a prearraignment interrogation conducted by the New York City Police and an Assistant District Attorney.

2. Whether petitioner's rights, under the Fourteenth Amendment of the United States Constitution, were violated by the admission into evidence, at his trial, of a voluntary confession obtained during the prearraignment interrogation.

Constitutional Provisions and Statutes Involved

U. S. Const. Amend. XIV:

Section 1.

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N. Y. Const. art. I, § 6:

> "* * * [I]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. * * *
>
> "No person shall be deprived of life, liberty or property without due process of law."

N. Y. Code Crim. Pro. § 165:

> "The defendant must in all cases be taken before the magistrate without unnecessary delay * * *."

N. Y. Code Crim. Pro. § 301:

> "The bench warrant issued upon the indictment must, if the crime be a felony, be substantially in the following form:
>
> * * *
>
> "You are, therefore, commanded forthwith to arrest the above named * * *, and bring him before that court * * * to answer the indictment; or if the

court have [sic] adjourned for the term, that you deliver him into the custody of the * * * warden of the city prison of the city of New York."

N. Y. Code Crim. Pro. § 308:

"If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel."

N. Y. Code Crim. Pro. § 395:

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor * * * ."

Statement

Petitioner was indicted on the 1st day of February, 1957 by the Grand Jury of Bronx County, for the crime of Murder, in the First Degree, in that on the 22nd day of January, 1957, he " * * * wilfully, feloniously and of his malice aforethought, did shoot and kill one Frank Palermo, Jr., with a Pistol and revolver" (10-12).*

The facts upon which the indictment was predicated are as follows:

Between 5:00 and 6:00 P. M. in the evening of January 22, 1957, petitioner, Vincent Joseph Spano, had an argument over money with the deceased, Frank Palermo, Jr., at the Roosevelt Bar & Tavern, in Bronx County. A fist fight ensued outside the tavern and petitioner, apparently, came off second best. The deceased then admonished Spano

* Figures in parentheses refer to folios of the record on appeal unless otherwise specified.

to bring some money to a candy store, where he would be waiting (104-122; 200-202; 904-906; 2475).

Petitioner walked from the scene of the affray to a furnished room he rented at 4650 Park Avenue, Bronx County; armed himself with a loaded revolver and walked back to the candy store where Palermo indicated he would be waiting. Spano, thereby, traversed a distance of fifteen to sixteen blocks in order to procure the weapon and arrive at the scene of the crime (2135, 2191, 2475, 2476). Petitioner was seen entering the store brandishing a pistol, by at least two eye-witnesses, Vincent Leone and Peter Guerriero, the latter of whom identified Spano at the trial (411-414, 790, 791, 1042).

Five bullets were discharged in two separate volleys at the deceased, who had arrived at the store a short time before Spano. With the exception of Guerriero, who had ducked behind a soda counter, three other persons, who had been in the store, namely, Neil DeLuca, Vincent Leone and a person known as Flanagan, fled when the shooting started (568, 569). This trio could not identify Spano as the killer.

Spano fled from the scene and did not return home (2423).

Anthony Napolitano, the owner of the Roosevelt Bar & Tavern, testified that a day or two following the crime petitioner had telephoned stating that he "was going to give himself up and that he was going to get a lawyer" (985, 986).

A rookie patrolman of the New York City Police Force, Garper Bruno, testified that he knew petitioner for about eight or ten years, having attended school with him (2252).

On February 3, 1957, at about 9:25 P. M., petitioner telephoned Bruno at home (2253, 2254). During this conversation, petitioner mentioned the fight with Frank Palermo and indicated that the deceased had administered a bad

beating upon him. He further stated that he was dazed and that "he went and shot at the deceased" (2267-2269).

Bruno, in response to petitioner's question as to what he should do, advised him to surrender (2267, 2268). On February 4, 1957, at about 7:10 P. M., Spano, accompanied by an attorney of his own choosing, Tobias Russo, gave himself up to the police and an Assistant District Attorney in front of the Bronx County Building (2105).

Petitioner was taken to the office of an Assistant District Attorney, inside the Bronx County building, where he was well fed at about 11:00 P. M. (1816-1818, 2116). Petitioner was questioned casually, but adamantly refused to answer any questions concerning the crime and advised the police officers to see his attorney (1837-1839, 2115). Spano was then taken to the 46th Detective Squad in Bronx County for "booking". Detective Ciccone asserted that Spano asked for his attorney, but the detective was unable to locate petitioner's attorney in the telephone book (1253-1255).

Detectives Lehrer and Farrell asserted that Spano never asked to see his lawyer (1840, 2115, 2206). In the early morning of February 5, 1957, at the 46th Detective Squad, Patrolman Bruno, Spano's friend, urged him to make a statement to the police, indicating that petitioner had caused Bruno a lot of trouble by telephoning him on February 3rd (2366-2383, 2388). Bruno asserted that at no time had he heard any hollering or screaming from the petitioner or anyone else (2299).

Although Officer Bruno observed some black and blue marks on petitioner, he testified that Spano never suggested that he had been beaten by the police, but had made a comment that the marks were just starting to go away (2310, 2312-2316).

Following his conversation with Patrolman Bruno, Spano gave a statement to an Assistant District Attorney which was substantially consistent with the statement he

had made over the telephone to Bruno prior to his surrender. Bruno, however, did recall that Spano mentioned the fact that he had asked to see his attorney.

In the automobile in which he was later transported to Police Headquarters for photographing, Spano remarked that he was not sorry that he had killed Palermo. "That guy was on my back all the time" (2049, 2140, 2229).

The petitioner was arraigned upon the opening of Court on February 5, 1957 (13, 14).

ARGUMENT

POINT ONE

The uncontradicted evidence clearly reveals that petitioner's confession was completely voluntary, and true.

There is not one iota of testimony in the record indicating that petitioner was in any way coerced, or that his confession was not completely voluntary.

Petitioner did not take the stand in his own defense and consequently the People's testimony, alone, must determine whether or not the confession was voluntary. A perusal of this testimony reveals that it was unequivocally voluntary.

It may be unfortunate, from petitioner's point of view, that he chose not to take the stand to rebut, if possible, the People's evidence, but as this Court pointed out in *Stein* v. *New York*, 346 U. S. 156 at 177:

> "In trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. *The Constitution safeguards the right of a defend-*

> *ant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying.* We cannot say that petitioners have been denied a fair hearing of the coercion charge." (Italics ours.)

Spano's decision not to take the stand is puzzling in view of the fact that unlike the *Stein* case, Spano had no prior criminal record of convictions.

It is significant that the New York Court of Appeals was convinced that Spano's confession on February 4th was completely voluntary. Thus, that Court declared:

> "It is clear in the record, and the fact is not now seriously challenged, that this confession was neither physically nor psychologically coerced." *People* v. *Spano*, 4 N. Y. 2d 256, 260.

Even in the brief upon the appeal to this Court, petitioner does not seriously urge that his confession was in any way coerced.

A.

Petitioner was arraigned at the earliest possible opportunity.

Since petitioner had surrendered at 7:10 P. M. on February 4, 1957, which was after the County Court, Bronx County, had recessed for the day, it was not feasible to arraign him until the following morning. Petitioner was arraigned upon the opening of Court on February 5th.

It is significant that the bench warrant that had been issued for his arrest directed that petitioner be delivered to the Warden of the City Prison only if the County Court had "*adjourned for the term*". This Court's attention is directed to the fact that the County Court had merely *recessed for the day.* The detention of some eight hours prior to petitioner's confession certainly cannot be said to have resulted in a denial of "that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *California*, 314 U. S. 219, 236).

See,

Lyons v. *Oklahoma*, 322 U. S. 596, 605.

The courts have refused to assume the presence of a magistrate at other than office hours. *Pierce* v. *United States*, 197 F. 2d 189, 193, cert. denied, 344 U. S. 846; *Garner* v. *United States*, 174 F. 2d 499, 502, 503, cert. denied, 337 U. S. 945.

It is, of course, settled that the case of *McNabb* v. *United States*, 318 U. S. 332, is not controlling in State prosecutions but only in federal. Thus, in *Gallegos* v. *Nebraska*, 342 U. S. 55, 64, this Court declared:

> "Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court."

Accord:

Cicenia v. *Lagay*, 357 U. S. 504 at 509;
Crooker v. *California*, 357 U. S. 433, 439 (footnote 4).

Thus, it is quite evident that there was no "unlawful detention" of petitioner prior to his arraignment. As the Court of Appeals said in affirming the judgment of conviction (*People* v. *Spano*, *supra*, 4 N. Y. 2d at 262):

> "All that has been said assumes that there was in fact an *unlawful detention* of the defendant in this case. *That fact is by no means established in the record.* When defendant surrendered shortly after seven o'clock at night on February 4th the County Court had recessed for the day. *The arraignment was had as soon thereafter as the courts reopened*, at about 10:00 A. M. the following morning. Moreover, since the court had not 'adjourned for the term' there was no injunction in the warrant requiring that

defendant be turned over to the warden of the city prison." (Italics ours.)

Cf., N. Y. Penal Law, § 1844.

B.

The confession was unquestionably true.

At page 60 of his brief, upon the appeal to the New York Court of Appeals, Spano specifically declared:

> *"The defendant in the case at bar does not deny that he shot Palermo and that he died from the wounds thus inflicted."*

Moreover, it is quite apparent that the confession Spano gave to the police and an Assistant District Attorney, following his voluntary surrender, was substantially consistent with the statement he had made to his friend, Patrolman Bruno, while still a fugitive, and with the testimony of Peter Guerriero, an eyewitness to the crime. The confession, therefore, would clearly appear to be the truth. As a matter of fact, it is apparent that petitioner attempted to make it as exculpatory as possible since he indicated that he was frightened and did not really know what he was doing when he fired the gun (2476-2484, 2487).

In *Ziang Sung Wan* v. *United States*, 266 U. S. 1, at p. 14, this Court asserted:

> "A confession is voluntary in law, if, but only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them."

In accordance with proper New York procedure, the Trial Court thoroughly instructed the jury on the factual issue of whether the confession was voluntary (3993-3997, 4068-4081), and left it for their determination *(Stein* v. *New York, supra)*.

As the New York Court of Appeals explained in its opinion of affirmance, the test to be applied in construing whether a confession is or is not voluntary is to determine whether it conforms with the statutory specifications of Section 395, N. Y. Code Crim. Pro. (*People* v. *Spano*, *supra*, 4 N. Y. 2d at 263):

> "In our State law the test to be applied to the instant confession is that which was crystallized in section 395 of the Code of Criminal Procedure requiring a determination as to whether a confession was voluntarily made in the traditional and ordinary sense, i.e., without duress, mental or physical. This is also the standard against which the confession must be measured for the purpose of determining whether or not it comports with the constitutional requirements of due process (*Gallegos* v. *Nebraska*, 342 U. S. 55, 65; *Brown* v. *Mississippi*, 297 U. S. 278, 285-286; *Stroble* v. *California*, *supra*; p. 197; *Stein* v. *New York*, *supra*, pp. 187-188). Obviously, since the confession before us was not extracted by means of threats, fear or violence but was freely or voluntarily given, there can be no valid objection to its admission on either of these grounds. Certainly, even the most vigilant guardian of civil liberties cannot fairly equate the present situation to that before the Supreme Court in *Rochin* v. *California* (342 U. S. 165) where it was held that admission in evidence of a confession procured by 'unlawfully assaulting, battering, torturing and falsely imprisoning the defendant' (*Rochin* v. *California*, *supra*, p. 167) deprived him of due process of law. The facts in this case show nothing comparable; *there was here no coercion, violence or brutality to the person of the defendant* (see *Irvine* v. *California*, 347 U. S. 128, 133)." (Italics ours.)

Recently, in the case of *Crooker* v. *California*, *supra*, this Court summarized the law with respect to statements taken of a State prisoner prior to arraignment (357 U. S. at p. 437):

"The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained. *Brown* v. *Allen*, 344 U. S. 443, 476 (1953). Neither does an admonition by the police to tell the truth, *Sparf* v. *United States*, 156 U. S. 51, 55-56 (1895), nor the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. *Filkes* v. *Alabama*, 352 U. S. 191 (1957)."

POINT TWO

Spano, who had consulted an attorney of his own choosing prior to his surrender, had been fully apprised of his legal rights. The fact that he had already been indicted did not endow him with rights superior to those to which any other accused would have been entitled.

The petitioner was in a far better position than many other suspected or accused persons find themselves when arrested and charged with crime. In most instances these individuals have not had an opportunity to discuss their legal problems with an attorney and consequently are usually uninformed of their legal rights. Spano, however, had consulted an attorney and presumably had been fully apprised of his constitutional and statutory prerogatives. The evidence adduced at trial establishes that petitioner adhered to this advice during the intermittent questioning by the police and an Assistant District Attorney (Cf.: *People* v. *Randazzio*, 194 N. Y. 147, 160).

It was only following his conversation with Patrolman Gaspar Bruno, a long time friend, that Spano decided to give a statement. Even then, Spano's confession contained exculpatory explanations, confirming that it was clearly a product of his own free choice.

The petitioner argues in his brief (Pet. Brief, p. 6) that "It is admitted that with the filing of the indictment, the

period of investigation ceased, and judicial proceeding commenced * * *." While judicial proceedings may have commenced with the filing of the indictment (N. Y. Code Crim. Pro. § 144), it certainly is *not* admitted or conceded by the respondent that the time for investigation had terminated. Indeed, it is difficult, if not impossible to determine when an investigation ever ceases prior to final judgment in an important criminal case.

Moreover, it is quite obvious that while the *dissent* in the New York Court of Appeals employed the term "judicial proceeding" with respect to the privilege against self-incrimination in New York State, the term "judicial proceeding" applies only "where incriminatory disclosure had been extorted by the constraint of legal process directed against the witness". *People* v. *Defore*, 242 N. Y. 13, 25; *Adams* v. *New York*, 192 U. S. 585, 597, 598. The confession was not obtained during the course of a "judicial proceeding" but, in actuality, it was anything but a judicial proceeding.

Not everything that occurs, following an indictment, is necessarily a "judicial proceeding upon the indictment". Since the privilege against self-incrimination did not apply to the proceeding during which the petitioner confessed, it is difficult to understand upon what basis he would predicate or evoke the privilege to exclude his confession.

A.

Petitioner was not entitled to have counsel present during the course of his prearraignment interrogation.

This Court has recognized that the right to counsel arises *upon arraignment* and not before. In the case of *Avery* v. *Alabama*, 308 U. S. 444, the unanimous opinion (per Black, J.) declared (308 U. S. at 445):

> "* * * but counsel were duly appointed for petitioner by the trial court as required both by Alabama law and the Fourteenth Amendment."

Continuing, the opinion observed (308 U. S. at 450):

> "Petitioner has thus been afforded the assistance of zealous and earnest counsel *from arraignment* to final argument in this Court." (Italics ours.)

Again, in *Stroble* v. *California*, 343 U. S. 181, this Court consistently ruled (p. 196 of 343 U. S.):

> "We conclude that petitioner received the full assistance of competent counsel. * * * On that question, as on all others, he has been afforded 'the assistance of zealous and earnest counsel from arraignment to final argument in this Court'. *Avery* v. *Alabama*, 308 U. S. 444, 450 (1940)."

In the recent cases of *Crooker* v. *California*, *supra*, and *Cicenia* v. *Lagay*, *supra*, this Court was confronted by situations in which State authorities had refused to permit an accused the opportunity to confer with counsel during police interrogation. In both cases, this Court affirmed the judgments, thereby sustaining the State Courts' views that there is no absolute right to have counsel present during police interrogation prior to arraignment, despite the fact that the accused has made a request therefor.

In *Cicenia*, at page 509 of 357 U. S., Mr. Justice Harlan cogently disposed of the petitioner's claim in that proceeding. The reasoning is equally applicable to the case at bar:

> "In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. *Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel.* Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. See *McNabb* v. *United States*, *supra*, *Mallory* v. *United States*, 354 U. S. 449. Still less should we impose this standard on each of the 48 States as a matter of constitutional compulsion. It is well known

> that law-enforcement problems vary widely from State to State, as well as among different communities within the same State. This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.' *Hoag* v. *New Jersey*, 356 U. S. 464, 468. See *Maxwell* v. *Dow*, 176 U. S. 581; *Twining* v. *New Jersey*, 211 U. S. 78." (Italics ours.)

In *Crooker* v. *California, supra*, Mr. Justice Clark, writing for the majority of this Court, aptly declared (p. 437 of 357 U. S.):

> "Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel. This Court has not previously had occasion to determine the character of a confession obtained after such a denial. But we have held that confessions made by indigent defendants prior to state appointment of counsel are not thereby rendered involuntary, even in prosecutions where conviction without counsel would violate due process under the Fourteenth Amendment. *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951)."

Continuing the Court's opinion in the *Crooker* case, Mr. Justice Clark analyzed these contentions which are similar to Spano's (357 U. S. at 439):

> "Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra*, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)."

This Court, in the *Crooker* case, disposed of the petitioner's contentions there, which likewise reveal the fallacy of Spano's protestations (357 U. S. at p. 441):

> "Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' *Betts v. Brady*, 316 U. S. 455, 462 (1942), demands no such rule."

It is interesting to note that in *Avery* v. *Alabama*, *supra*, this Court was confronted by a situation quite similar to the instant case. Avery *had been indicted* for the crime of murder in 1934 but fled the jurisdiction. He was apprehended in Pittsburgh several years later and was interrogated prior to his arraignment. While no issue was raised in this Court as to whether Avery was entitled to counsel prior to arraignment by virtue of the indictment lodged against him, the respondent has already adverted to the fact that the opinion of this Court declared that the right to counsel had been observed by affording an *attorney at arraignment* and throughout the proceedings thereafter.

At folio 18 of the record on appeal in the *Avery* case, it is quite apparent that Avery preserved his rights in the Trial Court by excepting to the introduction of the pre-arraignment statements, albeit not because an indictment was pending against him.

Folio 1 of the record on appeal in *Avery* reveals that the indictment was filed in 1934. Although the issue has,

perhaps, not been raised in this Court directly heretofore, it is not at all unusual for a fugitive, who is known to have committed a crime, to be indicted prior to his apprehension. This procedure not only tolls the running of the statute of limitations (not a matter of concern in a capital case) but makes it more convenient and practical to enlist the aid of the Federal Bureau of Investigation and sister State police agencies in efforts to capture the accused. An indictment is no more than a formal accusation of crime. The quantum of proof necessary to indict in the State of New York is less than that required to convict, so investigations do not necessarily cease with indictment.

Cf., N. Y. Code Crim. Pro., §§ 251 and 389.

Where a serious crime has been committed, such as was the situation in the matter at bar, the police have a duty to conduct an investigation to verify the accuracy of the charges. In this case, Patrolman Bruno had already informed the police of petitioner's confession to him on the telephone and the Court below aptly observed (*People* v. *Spano, supra,* 4 N. Y. 2d at 262):

> "In any event it was the duty of the police to verify the accuracy of the version of the conversation with the defendant given by Bruno. • • • The fact, impressed upon us by defendant, that he had been told by his attorney to disclose nothing but his name indicates that the *subsequent interrogation was anticipated.*" (Italics ours)

The defendant in *Lisenba* v. *California, supra,* was actually incarcerated in the City Jail on another charge when he was interrogated, in the absence of his attorney, about the murder of his wife. Lisenba's attorney had previously advised him that he would be indicted for the murder of his wife and cautioned him to remain silent. The confession, which was found to have been voluntarily made, was admitted into evidence and this Court affirmed the judgment of conviction, despite the fact that Lisenba's attorney had not been called as he had requested.

B.

There exists no duty to advise an accused of his right to counsel prior to arraignment.

The duty to advise an accused of his right to counsel does not exist in the State of New York prior to arraignment (Code Crim. Pro. §§ 188, 189, 296-a, 308, 699; *Spano* v. *New York, supra*, 4 N. Y. 2d 256, 264).

See, too,

Leland v. *Oregon*, 343 U. S. 790, Rehearing den. 344 U. S. 848;
Crooker v. *California, supra;*
Cicenia v. *Lagay, supra;*
People v. *Randazzio*, 194 N. Y. 147, 158.

Even under the Federal Rules of Criminal Procedure, there is no obligation to advise a defendant, prior to arraignment, of his right to counsel.

See:

Fed. Rules Crim. Proc., Rule 44;
44 Ky. L. J. 103;
3 A. L. R. 2d 1003.

In *State* v. *Bunk*, 4 N. J. 461, the Supreme Court of New Jersey, declared (p. 470):

> "In answer to the argument that the defendants were not advised of their rights and privileges the law over the years in this State has been that *a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts* * * * and such cautionary instructions are not an essential step in the establishment of the fact that a confession is voluntary." (Italics ours)

The law in New Jersey is consonant with the law of New York and most other jurisdictions.

III Wigmore on Evidence (3 Ed.) § 851.
See, generally, Beaney, The Right to Counsel in American courts (1955 U. of Mich. Press).

Petitioner's efforts to equate the circumstances under which the confession in the case at bar was obtained, with those that existed in *Rochin* v. *California*, 342 U. S. 165 or *Malinski* v. *New York*, 324 U. S. 401, and similar cases, are obvious attempts to create a misleading impression. The questioning of Spano was on a casual basis and there was no psychological or physical coercion employed.

See, *Spano* v. *New York, supra*, 4 N. Y. 2d at 263.

POINT THREE

Petitioner's right to counsel was not violated.

The respondent has already demonstrated that the duty to advise a person accused of crime, who has been taken into custody, of his legal rights, does not arise until arraignment. This is true not only under the statutes of the State of New York but also in federal jurisdictions and throughout most, if not all, of the States in the union. Spano, however, insists that his right to counsel was denied because the police were unable to contact his lawyer and produce him during prearraignment interrogation. This Court has considered and rejected the very proposition advanced by petitioner in the matter at bar, in the recent cases of *Cicenia* v. *Lagay* and *Crooker* v. *California, supra.*

If the circumstances of the proceeding herein had revealed that Spano had never consulted an attorney or received legal advice prior to his surrender, his contentions might be more appealing, but would still be meritless. Such circumstances, of course, do not exist in the matter at bar, since Spano concedes that he was advised of his legal rights prior to his surrender.

The inescapable conclusion one must draw from petitioner's position with respect to the right to counsel is that he seeks to adopt the very proposal which was denounced by this Court in the *Cicena* and *Crooker* cases, *supra*. Spano would have this Court announce an edict that would severely hamper and frustrate effective law enforcement. In view of the alarming increase in the number of reported major crimes in this country, the respondent submits that such additional hindrances of police authority are neither warranted nor required under due process of law.

See:

Hearings on S. Res. 234 Before d Subcommittee on Constitutional Rights of the Committee on the Judiciary, 85th Cong. March 7 and 11, 1958, pp. 2-12; 123-135.

In Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, and dissenting opinions in *Harris* v. *South Carolina*, 338 U. S. 68, and *Turner* v. *Pennsylvania*, 338 U. S. 62, he cogently explains how disastrous an impact a rule such as petitioner urges, would be wrought upon law enforcement and society, in general, if adopted. In *Watts*, at page 57 of 338 U. S., Justice Jackson observes, that while it may be a peril to individual freedom to subject one without counsel to questioning, it likewise poses a serious peril to the solution of crime "because in our adversary system he [an attorney] deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem."

Professor Wigmore, in his treatise on evidence, had occasion to discuss an analogous problem. Although Wigmore was analyzing the situation under the Fourth Amendment, the analogy is equally apropos to the problem in the matter before this Court. In a "parable" set forth in the treatise, the following is stated:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." VIII Wigmore on Evidence (3rd ed.) § 2184, p. 40.

See, too:

47 Georgetown L. J. 1, 27;
1 Greenleaf, Evidence § 254a (16th ed. 1899).

There is no question whatsoever, from the record in the case at bar, that Spano was represented by counsel at his arraignment and upon every proceeding thereafter. This certainly complied with even the most stringent requirements for counsel.

See:

Canizio v. *New York*, 327 U. S. 82;
Lisenba v. *California*, *supra*;
Stroble v. *California*, *supra*;
Ashdown v. *Utah*, 357 U. S. 426;
Avery v. *Alabama*, *supra*.

What petitioner seems to overlook is that the Sixth Amendment to the Constitution, even if it were applicable to the case at bar, which it is not, would not require assignment of counsel prior to arraignment.

This Court, in *Gallegos* v. *Nebraska*, *supra*, declared (342 U. S. at p. 64):

"The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecution."

But, even the Sixth Amendment would have been satisfied herein.

The New York Constitution does not compel or prescribe the assignment of counsel at any stage earlier than the arraignment (N. Y. Const. Art. I, § 6). In short, it is unequivocally manifest that Spano's rights to counsel were protected at all stages of the "judicial proceedings" upon his indictment.

Let us assume that Spano had not surrendered voluntarily but had been apprehended in another State, or, for that matter, in another part of New York State. Under petitioner's conception of what the law should be, it would seem that the police officers who would be dispatched to bring him back to New York City, would be precluded from discussing any matter pertaining to the case since it would obviously be difficult, if not impossible, to have an attorney assigned to accompany Spano. It would be equally difficult and unfeasible to have a retained attorney accompany the police officers. It requires very little imagination to visualize the dilemma this would pose to law enforcement authorities. In effect, the police would have to sit "mummy-like" on the trip back to New York. Even if in general conversation Spano had made a full voluntary confession, he would nevertheless insist that it would be inadmissible at his trial because an attorney had not been present. There is no constitutional requirement, under due process of law, that would demand such a paradoxical result.

What of a defendant who is indigent and cannot afford an attorney? Petitioner, apparently, to be consistent, would have to maintain that the police could not question such a person either unless a proper attorney were assigned immediately upon arrest. Moreover, Spano necessarily must also contend that the police ought to inform one under indictment of his right to counsel, otherwise it could be claimed later that the accused did not understandingly waive the privilege.

The fact that has been all but ignored is that there is *no evidence whatsoever that Spano even knew that an indictment had been found against him.* That Section 1782, N. Y. Penal Law, makes it a misdemeanor for anyone to disclose the fact that an indictment has been found before the accused is in custody, bolsters the probability that Spano was unaware that he had been indicted at the time of his surrender.

It is evident that the attorney who surrendered Spano to the police fully expected that there would be attempts to question him. Were this not so, there would have been no logic to his instruction to petitioner to remain silent (*People* v. *Spano, supra,* 4 N. Y. 2d at 262). The fact of an indictment, in other words, according to petitioner, grants an accused an unqualified immunity from being questioned about the crime, and protects him even if he volunteers a statement of confession by precluding its use at a trial.

It appears to be of no significance to Spano that an indictment is nothing more than an accusation. In the *Lisenba* case, *supra,* the petitioner there was told, in no uncertain terms by his attorney, that he would be indicted for the murder of his wife. Yet this Court affirmed the judgment of conviction. In *Avery* v. *Alabama, supra,* the defendant there was under indictment at the time he was captured. A prearraignment statement was taken from him, apparently in the absence of counsel; nevertheless this Court affirmed the conviction.

For example, if fifty witnesses saw Spano shoot Palermo, the fact of an indictment could hardly make him *more* suspect. Petitioner, however, would apparently urge, anomalously, that a pre-arraignment statement would be admissible in evidence under such circumstances only if he had not yet been indicted. It is impossible to discern how

Spano's fundamental rights could have been adversely affected by virtue of the grand jury's true bill.

It would be a simple enough matter to withhold presentment of a case to a grand jury until after the accused has been apprehended and a statement obtained. In the foregoing example, however, would it be morally right, under Spano's conception of the law, to defer action on an indictment until the accused were apprehended? Certainly, this Court cannot be swayed by such a "Pickwickian" approach to criminal investigation. It is patent that if a man is already a prime suspect in a criminal investigation, the finding of an indictment will not affect his fundamental rights one way or another.

In the final analysis, the test is whether the pre-arraignment statement was obtained in a manner that violated "that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *California*, *supra*, 314 U. S. at 236; *Crooker* v. *California*, *supra*, 357 U. S. at 439).

If "gossamer possibilities of prejudice" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 122) are to be assumed merely because the suspect has been indicted, then it is plain that by a similar vein of reasoning, prejudice could be presumed by a plea of guilty or a confession in open court. It cannot seriously be disputed that a defendant pleading guilty in open Court usually would much rather not do so, except for the knowledge that his guilt is irrefutable or that he might be convicted of a higher degree of crime if he went to trial. Frequently, a defendant pleads guilty only after being "sold a bill of goods" by his own counsel.

The respondent submits that if a suspect is disposed to make a pre-arraignment statement to the police under circumstances clearly indicating that he is acting voluntarily, and that such statement is manifestly the truth, this Court ought not order it suppressed merely because he was under indictment at the time. The case at bar presents such a situation.

CONCLUSION

It is respectfully submitted that the order and judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner,
v.
The People of the State of New York.

On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record. *Norris* v. *Alabama*, 294 U. S. 587.

The State's evidence reveals the following: Petitioner Vincent Joseph Spano is a derivative citizen of this country, having been born in Messina, Italy. He was 25 years old at the time of the shooting in question and had graduated from junior high school. He had a record of regular employment. The shooting took place on January 22, 1957.

On that day, petitioner was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds who had fought in Madison Square Garden, took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued,

with the decedent knocking petitioner down and then kicking him in the head three or four times. Shock from the force of these blows caused petitioner to vomit. After the bartender applied some ice to his head, petitioner left the bar, walked to his apartment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent, three friends of decedent, at least two of whom were ex-convicts, and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness; the three friends of decedent did not see the person who fired the shot. Petitioner then disappeared for the next week or so.

On February 1, 1957, the Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest, commanding that he be forthwith brought before the court to answer the indictment, or if the court had adjourned for the term, that he be delivered into the custody of the Sheriff of Bronx County. See N. Y. Code Crim. Proc. § 301.

On February 3, 1957, petitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day, February 4, at 7:10 p. m., petitioner, accompanied by counsel, surrendered himself to

the authorities in front of the Bronx County Building, where both the office of the Assistant District Attorney who ultimately prosecuted his case and the courtroom in which he was ultimately tried were located. His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney and at 7:15 p. m. the questioning began, being conducted by Assistant District Attorney Goldsmith, Lt. Gannon, Detectives Farrell, Lehrer and Motta, and Sgt. Clarke. The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." Detective Farrell testified:

"Q. And you started to interrogate him?
"A. That is right. . . .
"Q. What did he say?
"A. He said 'you would have to see my attorney. I tell you nothing but my name.' . . .
"Q. Did you continue to examine him?
"A. Verbally, yes, sir."

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney's name in the telephone book.[1] He was given two sandwiches, coffee and cake at 11 p. m.

At 12:15 a. m. on the morning of February 5, after five hours of questioning in which it became evident that peti-

[1] How this could be so when the attorney's name, Tobias Russo, was concededly in the telephone book does not appear. The trial judge sustained objections by the Assistant District Attorney to questions designed to delve into this mystery.

tioner was following his attorney's instructions, on the Assistant District Attorney's orders petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30 and questioning was resumed at 12:40. The character of the questioning is revealed by the testimony of Detective Farrell:

> "Q. Who did you leave him in the room with?
>
> "A. With Detective Lehrer and Sergeant Clark came in and Mr. Goldsmith came in or Inspector Halk came in. It was back and forth. People just came in, spoke a few words to the defendant or they listened a few minutes and they left."

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner's close friend, Bruno, could be of use. He had been called out on the case around 10 or 11 p. m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner's telephone call had gotten him "in a lot of trouble," and that he should seek to extract sympathy from petitioner for Bruno's pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner's sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess, but again petitioner clung to his attorney's advice.

Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement. Accordingly, at 3:25 a. m. the Assistant District Attorney, a stenographer, and several other law enforcement officials entered the room where petitioner was being questioned, and took his statement in question and answer form with the Assistant District Attorney asking the questions. The statement was completed at 4:05 a. m.

But this was not the end. At 4:30 a. m. three detectives took petitioner to Police Headquarters in Manhattan. On the way they attempted to find the bridge from which petitioner said he had thrown the murder weapon. They crossed the Triborough Bridge into Manhattan, arriving at Police Headquarters at 5 a. m., and left Manhattan for the Bronx at 5:40 a. m. via the Willis Avenue Bridge. When petitioner recognized neither bridge as the one from which he had thrown the weapon, they reentered Manhattan via the Third Avenue Bridge, which petitioner stated was the right one, and then returned to the Bronx well after 6 a. m. During that trip the officers also elicited a statement from petitioner that the deceased way always "on [his] back," "always pushing" him and that he was "not sorry" he had shot the deceased. All three detectives testified to that statement at the trial.

Court opened at 10 a. m. that morning, and petitioner was arraigned at 10:15.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict and petitioner was sentenced to death. The New York Court of Appeals affirmed the conviction over three dissents, 4 N. Y. 2d 256, 173 N. Y. S. 2d 793, 150 N. E. 2d 226, and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment. 358 U. S. 919.

Petitioner's first contention is that his absolute right to counsel in a capital case, *Powell* v. *Alabama*, 287 U. S. 45, became operative on the return of an indictment against him, for at that time he was in every sense a defendant in a criminal case, the grand jury having found sufficient cause to believe that he had committed the crime. He argues accordingly that following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. He seeks to distinguish *Crooker* v. *California*, 357 U. S. 426, and *Cicenia* v. *Lagay*, 357 U. S. 504, on the grounds that in those cases no indictment had been returned. We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases.[2] Those

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[2] *E. g.*, *Cicenia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Ashdown* v. *Utah*, 357 U. S. 426; *Payne* v. *Arkansas*, 356 U. S. 560; *Thomas* v. *Arizona*, 356 U. S. 390; *Pikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Stein* v. *New York*, 346 U. S. 156; *Brown* v. *Allen*, 344 U. S. 443; *Stroble* v. *California*, 343 U. S. 181; *Gallegos* v. *Nebraska*, 342 U. S. 55; *Johnson* v. *Pennsylvania*, 340 U. S. 881; *Harris* v. *South Carolina*, 338 U. S. 68; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Watts* v. *Indiana*, 338 U. S. 49; *Lee* v. *Mississippi*, 332 U. S. 742; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547;

cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. The facts of no case recently in this Court have quite approached the brutal beatings in *Brown* v. *Mississippi*, 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944). But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school and the record indicates that he had a history of emotional instability.[3] He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many.

Lisenba v. *California*, 314 U. S. 219; *Vernon* v. *Alabama*, 313 U. S. 547; *Lomax* v. *Texas*, 313 U. S. 544; *White* v. *Texas*, 310 U. S. 530; *Canty* v. *Alabama*, 309 U. S. 629; *Chambers* v. *Florida*, 309 U. S. 227; *Brown* v. *Mississippi*, 297 U. S. 278.

[3] Medical reports from New York City's Fordham Hospital introduced by defendant showed that he had suffered a cerebral concussion in 1955. He was described by a private physician in 1951 as "an extremely nervous tense individual who is emotionally unstable and maladjusted," and was found unacceptable for military service in 1951, primarily because of "Psychiatric disorder." He failed the Army's AFQT–1 intelligence test. His mother had been in mental hospitals on three separate occasions.

They included Assistant District Attorney Goldsmith, one Hyland of the District Attorney's Office, Deputy Inspector Halks,[4] Lieutenant Gannon, Detective Ciccone, Detective Motta, Detective Lehrer, Detective Marshal, Detective Farrell, Detective Leira,[5] Detective Murphy, Detective Murtha, Sergeant Clarke, Patrolman Bruno and Stenographer Baldwin. All played some part, and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's

[4] His name is sometimes spelled "Hawks."

[5] Although each is referred to separately in the record, it may be that Detectives Lehrer and Leira are the same person.

telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Cf. *Leyra* v. *Denno*, 347 U. S. 556. Petitioner was apparently unaware of John Gay's famous couplet:

> "An open foe may prove a curse,
> But a pretended friend is worse,"

and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting.[8] Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. Compare *Crooker* v. *California*, *supra*, and *Cicenia* v. *Lagay*, *supra*. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. *Malinski* v. *New York*, 324 U. S. 401. Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment.

The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evi-

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[8] *Lisenba* v. *California*, 314 U. S. 219, is not to the contrary. There, while petitioner had already been arraigned on an incest charge, his later questioning and confession concerned a murder.

dence in the record from which the jury might have found guilt, relying on *Stein* v. *New York*, 346 U. S. 156. But *Payne* v. *Arkansas*, 356 U. S. 560, 568, authoritatively establishes that *Stein* did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. *Stein* held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it. The judgment must be

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner, v. The People of the State of New York. } On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Brennan joins, concurring.

While I join the opinion of the Court, I add what for me is an even more important ground of decision.

We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. See *Crooker* v. *California*, 357 U. S. 433, and cases cited. But here we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. This is a capital case; and under the rule of *Powell* v. *Alabama*, 287 U. S. 45, the defendant was entitled to be represented by counsel. This representation by counsel is not restricted to the trial. As stated in *Powell* v. *Alabama*, *supra*, p. 57:

> "during perhaps the most crucial period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. We do not have here mere suspects who are being secretly interrogated by the police as in *Crooker* v. *California, supra*, nor witnesses who are being questioned in secret administrative or judicial proceedings as in *In re Groban*, 352 U. S. 330, and *Anonymous Nos. 6 & 7* v. *Baker*, — U. S. —. This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in *Powell* v. *Alabama, supra*, that the right of counsel extends to the preparation for trial, as well as to the trial itself. As Professor Chafee once said, "A person accused of crime needs a lawyer right after his arrest probably more than at any time." Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951–1952), p. 541. When he is deprived of that right after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him. This *secret inquisition* by the police when defendant asked for and was denied counsel was as serious an invasion of his constitutional rights as the denial of a continuance in order to employ counsel was held to be in *Chandler* v. *Fretag*, 348 U. S. 3, 10. What we said in *Avery* v. *Alabama*, 308 U. S. 444, 446, has relevance here:

". . . the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of coun-

sel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."

I join with Judges Desmond, Fuld, and Van Voorhis of the New York Court of Appeals (4 N. Y. 2d 256, 266), in asking, what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights.

SUPREME COURT OF THE UNITED STATES

No. 582.—October Term, 1958.

Vincent Joseph Spano, Petitioner, v. The People of the State of New York. } On Writ of Certiorari to the Court of Appeals of New York.

[June 22, 1959.]

Mr. Justice Stewart, whom Mr. Justice Douglas and Mr. Justice Brennan join, concurring.

While I concur in the opinion of the Court, it is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment.

Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. See *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *LaGay*, 357 U. S. 504. When the petitioner surrendered to the New York authorities he was under indictment for first degree murder.

Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. *Powell* v. *Alabama*, 287 U. S. 45. Indeed the right to the assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial. *Chandler* v. *Fretag*, 348 U. S. 3.

What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office, a police station, and an automobile. Throughout the night the petitioner

repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied. He finally was induced to make a confession. That confession was used to secure a verdict sending him to the electric chair.

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.